

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CITY OF TACOMA, a municipal corporation,)
)
 Plaintiff,) No. C11-5747 BHS
)
 v.)
) **DEFENDANT CLEAR CHANNEL'S**
 CLEAR CHANNEL OUTDOOR, INC., a) **ANSWER TO COMPLAINT AND**
 Delaware corporation,) **COUNTERCLAIMS**
)
 Defendant.)
 _____)

Defendant Clear Channel Outdoor, Inc. ("Clear Channel"), for its answer to the Complaint of the City of Tacoma (the "City"), alleges and states as follows:

I. NATURE OF ACTION

1.1 Paragraph 1.1 states a legal contention to which no answer is required. To the extent an answer is required, Clear Channel admits the allegations set forth in paragraph 1.1.

II. PARTIES

2.1 Clear Channel admits the allegations set forth in paragraph 2.1.

2.2 Clear Channel admits the allegations set forth in paragraph 2.2.

III. JURISDICTION AND VENUE

3.1 Clear Channel admits the allegations set forth in paragraph 3.1.

3.2 Clear Channel admits the allegations set forth in paragraph 3.2.

IV. FACTUAL ALLEGATIONS

4.1 Clear Channel admits the allegations set forth in paragraph 4.1.

4.2 Clear Channel admits that the City enacted Ordinance 26101 in 1997. To the extent paragraph 4.2 states legal contentions regarding the effect of the Ordinance, no answer is required.

4.3 Clear Channel admits that it filed a complaint against the City in Pierce County Superior Court (Cause No. 07-2-10344-4) in July of 2007 (the "Clear Channel Action"), seeking declaratory and injunctive relief. The complaint speaks for itself. Clear Channel denies paragraph 4.3 to the extent it states allegations inconsistent with the Clear Channel Action. To the extent paragraph 4.3 states legal contentions, no answer is required.

4.4 Clear Channel admits that the Clear Channel Action was removed to this Court. To the extent paragraph 4.4 states legal contentions, no answer is required.

4.5 Clear Channel admits that Clear Channel and the City engaged in settlement discussions regarding the Clear Channel Action and that a binding settlement was reached. Clear Channel otherwise denies the allegations set forth in paragraph 4.5.

4.6 Clear Channel lacks sufficient information to admit or deny the allegations in paragraph 4.6.

4.7 Clear Channel admits that it entered into an agreement with the City resolving the Clear Channel Action (the "Settlement Agreement"), and that the Settlement Agreement speaks for itself. To the extent paragraph 4.7 purports to characterize the Settlement Agreement or states legal contentions, no answer is required. Clear Channel otherwise denies the allegations set forth in paragraph 4.7.

4.8 Clear Channel admits that the City Council approved the Settlement Agreement unanimously and that it was thereafter signed by the City. Clear Channel further admits that it did not sign the Settlement Agreement within the time frame described in paragraph 4.8 (nor was it required to) but that it later signed the Agreement. Clear Channel further admits that it entered

1 the First Amendment to the Settlement Agreement (“Amendment”). The Settlement Agreement
 2 and the Amendment thereto speak for themselves. To the extent paragraph 4.8 purports to
 3 characterize the Settlement Agreement or the Amendment, or states legal contentions, no answer
 4 is required. Clear Channel otherwise denies the allegations set forth in paragraph 4.8.

5 4.9 Clear Channel lacks sufficient information to admit or deny the allegations set
 6 forth in paragraph 4.9.

7 4.10 Clear Channel lacks sufficient information to admit or deny the allegations set
 8 forth in paragraph 4.10.

9 4.11 Clear Channel lacks sufficient information to admit or deny the allegations set
 10 forth in paragraph 4.11.

11 4.12 Clear Channel lacks sufficient information to admit or deny the allegations set
 12 forth in paragraph 4.12.

13 4.13 Clear Channel lacks sufficient information to admit or deny the allegations set
 14 forth in paragraph 4.13.

15 4.14. Clear Channel admits that it executed the Settlement Agreement after July 26,
 16 2011. Clear Channel otherwise denies the allegations set forth in paragraph 4.14.

17 4.15. Clear Channel admits that the Tacoma City Council purported to adopt Substitute
 18 Ordinance (“S.O.”) 28009 on August 9, 2011. Clear Channel otherwise denies the allegations set
 19 forth in paragraph 4.15.

20 4.16 Clear Channel admits the allegations set forth in paragraph 4.16.

21 4.17 Clear Channel admits that, to date, the City has failed to adopt a billboard
 22 ordinance of the sort contemplated in paragraph 3 on page 2 of the Settlement Agreement. Clear
 23 Channel otherwise denies the allegations set forth in paragraph 4.17.

24 V. CLAIM ONE

25 5.1 Clear Channel incorporates its responses to paragraph 1.1. through 4.17, *supra*.

5.2 Clear Channel states that no answer to paragraph 5.2 is required insofar as that paragraph pertains to the City's Lack of Consideration claim dismissed pursuant to the Court's December 5, 2011, Order. The Settlement Agreement speaks for itself, and to the extent paragraph 5.2 purports to characterize the Settlement Agreement, no answer is required. Clear Channel otherwise denies the allegations set forth in paragraph 5.2.

5.3 Clear Channel states that no answer to paragraph 5.3 is required insofar as that paragraph pertains to the City's Lack of Consideration claim dismissed pursuant to the Court's December 5, 2011, Order (Dkt. 20). The Settlement Agreement speaks for itself and to the extent paragraph 5.3 purports to characterize the Settlement Agreement, no answer is required. Clear Channel otherwise denies the allegations set forth in paragraph 5.3.

VI. CLAIM TWO

6.1 Clear Channel incorporates its responses to paragraph 1.1 through 5.3, *supra*.

6.2 To the extent paragraph 6.2 sets forth a legal contention, no answer is required. Clear Channel otherwise denies the allegations set forth in paragraph 6.2.

6.3 The Settlement Agreement speaks for itself and to the extent paragraph 6.3 purports to characterize the Settlement Agreement, no answer is required. Clear Channel otherwise denies the allegations set forth in paragraph 6.3.

6.4 Clear Channel admits that the Settlement Agreement speaks for itself. To the extent paragraph 6.4 purports to characterize the Settlement Agreement or states a legal contention, no answer is required. Clear Channel otherwise denies the allegations set forth in paragraph 6.4.

VII. CLAIM THREE

7.1 Clear Channel incorporates its responses to paragraph 1.1 through 6.4, *supra*.

7.2 Clear Channel admits that the Settlement Agreement speaks for itself. To the extent paragraph 7.2 purports to characterize the Settlement Agreement or states a legal contention, no answer is required. Clear Channel otherwise denies the allegations set forth in paragraph 7.2.

1 7.3 Clear Channel denies the allegations set forth in paragraph 7.3.

2 7.4 Clear Channel denies the allegations set forth in paragraph 7.4.

3 **VIII. CLAIM FOUR**

4 8.1 Clear Channel incorporates its responses to paragraphs 1.1 through 7.4, *supra*.

5 8.2 Clear Channel states that no answer to paragraph 8.2 is required insofar as that
6 paragraph pertains to the City's Repudiation claim dismissed pursuant to the Court's December
7 5, 2011, Order. To the extent an answer is required, Clear Channel admits that the Settlement
8 Agreement speaks for itself. To the extent paragraph 8.2 purports to characterize the Settlement
9 Agreement or states a legal contention, no answer is required.

10 8.3 Clear Channel states that no answer to paragraph 8.3 is required insofar as that
11 paragraph pertains to the City's Repudiation claim dismissed pursuant to the Court's December
12 5, 2011, Order. To the extent an answer is required, Clear Channel denies the allegations set
13 forth in paragraph 8.3.

14 8.4 Clear Channel denies the allegations set forth in paragraph 8.4.

15 **IX. CLAIM FIVE**

16 9.1 Clear Channel incorporates its responses to paragraphs 1.1 through 8.4, *supra*.

17 9.2 Clear Channel states that no answer to paragraph 9.2 is required insofar as that
18 paragraph pertains to the City's Invalid Execution claim dismissed pursuant to the Court's
19 December 5, 2011, Order. To the extent an answer is required, Clear Channel admits that the
20 Settlement Agreement speaks for itself. To the extent paragraph 9.2 purports to characterize the
21 Settlement Agreement, no answer is required. Clear Channel otherwise denies the allegations set
22 forth in paragraph 9.2.

23 9.3 Clear Channel states that no answer to paragraph 9.3 is required insofar as that
24 paragraph pertains to the City's Invalid Execution claim dismissed pursuant to the Court's
25 December 5, 2011, Order. To the extent an answer is required, Clear Channel denies the
26 allegations set forth in paragraph 9.3.

AFFIRMATIVE DEFENSES

1. The City fails to state a claim upon which relief may be granted.
2. Clear Channel's alleged acts were not the cause of any injury to the City.
3. The City's claims are barred, in whole or in part, by the doctrine of estoppel.

COUNTERCLAIMS

Clear Channel states the following counterclaims against the City:

JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction over the counterclaims set forth below pursuant to 28 U.S.C. § 1332. Clear Channel is a Delaware corporation with its principal place of business in San Antonio, Texas. The matter in controversy includes Clear Channel's right to enforce the Settlement Agreement and exceeds \$75,000.

2. Personal jurisdiction exists over counterdefendant the City because the City has its principal place of business in Washington, conducts substantial business within Washington related to the unlawful activities complained of herein, and has engaged in many of the unlawful activities complained of herein in Washington. In addition, the City has voluntarily appeared in this forum as a plaintiff in this action.

3. Venue is appropriate pursuant to 28 U.S.C. § 1391 because a substantial portion of the events giving rise to these counterclaims occurred in this District.

BACKGROUND

4. This action arises from the City's attempt to renege on the Settlement Agreement it negotiated, approved, and executed to resolve the Clear Channel Action.

5. In that Action, Clear Channel sued the City seeking a declaratory judgment and an injunction barring the City from enforcing its demand that Clear Channel remove nearly two hundred billboards without compensation or face steep fines and penalties. *Clear Channel v. City of Tacoma, et al.*, Pierce County Superior Court No. 07-2-10344-4.

6. The City endeavored to enforce that demand pursuant to a 1997 Tacoma Ordinance that amended the Tacoma Sign Code to target billboards. Tacoma Ordinance 26101;

1 Compl. ¶ 4.2. That Ordinance purported to define certain existing billboards as “non-
2 conforming,” and required their removal by August 1, 2007. Compl. ¶ 4.2.

3 7. Clear Channel filed suit in the Superior Court of Washington for Pierce County,
4 seeking a judgment declaring these removal rules invalid under constitutional and statutory law.
5 Compl. ¶ 4.3.

6 8. By stipulated order, the court enjoined the City from assessing related fines or
7 penalties against Clear Channel during the pendency of the lawsuit. Stipulated Order Relating to
8 Tolling of Civil Penalties, No. 07-2-10344-4 (Pierce County Superior Court, Aug. 3, 2007).

9 9. The City removed the case to this Court. *Clear Channel v. City of Tacoma, et al.*,
10 No. C07-5407 BHS (W.D. Wash.), Dkt. 1 (Aug. 7, 2007).

11 10. Rather than defend the legality of the Ordinance and its attempt to enforce it, the
12 City entered into settlement discussions with Clear Channel in 2008 and thereafter repeatedly
13 continued the trial date to facilitate those discussions. For example, the parties filed a joint
14 motion on May 11, 2009, which stated:

15 The parties continue to work towards settlement of the claims and need
16 additional time to consider settlement possibilities. Given the complexities
17 involved, the parties jointly request that the trial be continued to a date in
January 2010, or any time thereafter that is convenient for the court, to
afford more time for settlement discussions.

18 No. C07-5407BHS, at Dkt. 19 at 1-2.

19 11. On March 16, 2010, the parties jointly represented to the Court that they had
20 “reached an agreement in principle to resolve this case.” *Id.* at Dkt. 29. They further represented
21 that:

22 Based on the current status, the parties agree that the pending
23 summary judgment motion filed by Clear Channel should be taken off the
24 calendar. Additionally, the parties do not anticipate that the matter will
need to be tried.

25 *Id.*

26 12. The parties agreed to resolve the litigation in two steps. First, they executed an
“Agreement Re Dismissal of Lawsuit,” which provided that, upon the City’s execution of a

1 Settlement Agreement, the parties would file a Stipulated Dismissal of the lawsuit. Compl.,
 2 Ex. 4 to Ex. A ¶ 1. Second, “in exchange for Clear Channel’s dismissal of the Litigation . . . and
 3 the payment . . . of \$100.00, and other good and valuable consideration,” the Settlement
 4 Agreement granted Clear Channel the “option . . . of executing [the Settlement] Agreement at
 5 any time within six (6) months of the Approval Date.” Compl., Ex. A ¶ 6.

6 13. The Settlement Agreement contains two distinct and separate sets of provisions
 7 relevant to this lawsuit: first, provisions regarding the City’s potential adoption of an ordinance
 8 regulating digital billboards and Clear Channel’s rights related thereto; and second, separately
 9 and more generally, provisions relating to Clear Channel’s “vested rights” in its existing signage.

10 14. First, the Settlement Agreement contemplated the possibility that the City would
 11 adopt an “Ordinance” regulating digital billboards. The Settlement Agreement was clear that
 12 “[n]othing in this Agreement shall require the City to enact any ordinance.” Compl., Ex. A ¶ 14.

13 15. In the event it did so, however, the City would grant Clear Channel “permits to
 14 construct ten digital billboards,” in exchange for Clear Channel removing certain billboards and
 15 relinquishing certain relocation credits. Compl., Ex. A ¶ 2.

16 16. The scope of any such ordinance, and the parties’ obligations thereunder, were
 17 defined specifically in paragraph 3 to the Settlement Agreement. That paragraph states expressly
 18 that “[a]ll of the provisions of this paragraph are conditioned upon the enactment of an
 19 Ordinance.” Compl, Ex. A ¶ 3.

20 17. Second, separate and apart from the paragraphs regarding digital billboards, the
 21 Settlement Agreement expressly “acknowledge[d] Clear Channel’s vested rights” in its existing
 22 billboards and relocation permits. Compl., Ex. A ¶ 4. This acknowledgement was in no way
 23 conditioned on the City’s passage of any ordinance.

24 18. In recognition of these “vested rights,” and without any contingency, the
 25 Settlement Agreement states that, “[i]f and to the extent the City requires the removal of [Clear
 26 Channel’s billboards] or elimination of [its relocation] permits at some future date (other than in

1 connection with the construction of digital billboards as provided herein), the City will
 2 compensate Clear Channel for the fair market value of those interests.” Compl., Ex. A ¶ 4. This
 3 obligation did not depend on the City’s enactment of a digital billboard ordinance. It did,
 4 however, require the City to “pay to Clear Channel any monetary loss arising” from the removal
 5 of Clear Channel’s existing billboards, “including the fair market value for removed signs or
 6 elimination of relocation permits as a result of such ordinances or regulations.” Compl., Ex. A
 7 ¶ 5.

8 19. The Settlement Agreement was presented to the Tacoma City Council on July 27,
 9 2010, and was unanimously approved.

10 20. The next morning, July 28, 2010, counsel for the City made the following request
 11 of Clear Channel:

12 As I am sure you are aware, the Council unanimously approved the
 13 Settlement Agreement last night. Will you take care of notifying the Court?

14 21. On October 13, 2010, the case was dismissed by the Court pursuant to the terms
 15 of the Settlement Agreement. Paragraph 10 of that Agreement reads as follows:

16 Binding Effect. This Agreement *shall be binding upon* and inure to the
 17 benefit of *the City* and Clear Channel, its subsidiaries, affiliates, designated
 18 successors and assigns. *In the event of any challenge to this Agreement, the*
 19 *City and Clear Channel agree that they will defend the approval, validity,*
 20 *constitutionality, and enforceability of this Agreement* and any of the terms
 21 contained herein.

22 Compl., Ex. A, Settlement Agreement ¶ 10 (emphases added).

23 22. As anticipated under the Settlement Agreement, the City proceeded with efforts to
 24 enact an ordinance allowing digital billboards.

25 23. As the end of Clear Channel’s six-month option period approached, the City—
 26 acknowledging the validity and enforceability of the Settlement Agreement—signed an
 amendment extending the option period to August 15, 2011, in order to allow the City’s ongoing
 work on the digital billboard ordinance to continue. Compl. ¶ 4.8 & Ex. B.

24. On July 27, 2011, Clear Channel exercised its option under the Settlement Agreement. *See* Compl., Ex. A.

25. On August 9, 2011, two weeks after Clear Channel exercised its option, the Tacoma City Council purported to enact S.O. 28009. The Ordinance purported to amend Tacoma's Sign Code, Tacoma Municipal Code ("T.M.C.") chapters 13.06.520, 13.06.521, and 13.06.700.

26. S.O. 28009 prohibits the City from granting Clear Channel digital billboard permits. It does not, however, prevent the City from honoring its contractual commitment to pay fair market value for any billboards it forces Clear Channel to remove. That commitment is in no way contingent on the enactment of an ordinance authorizing digital billboards.

27. S.O. 28009 also provides that "billboards" that are not in compliance with T.M.C. 13.06.521M on September 1, 2011, are deemed non-conforming and must be "discontinued and removed or made conforming on or before March 1, 2012." In addition, the Ordinance amends the T.M.C.'s definition of a "billboard." Under S.O. 28009, a sign is a "billboard" if it is of a sufficient size, and if it is "an off-premises sign." T.M.C. 13.06.700. "Off-premises" is in turn defined as: "A permanent sign not located on the premises of the use or activity to which the sign pertains." *Id.*

28. Notwithstanding its ongoing contractual commitments under the Settlement Agreement that were in no way contingent on the enactment of a digital billboard ordinance, the City filed this action on August 18, 2011, alleging that the Settlement Agreement is unenforceable.

29. This action, and these counterclaims, followed.

FIRST COUNTERCLAIM
Breach of Contract

30. Clear Channel realleges each preceding paragraph as if fully set forth herein.

31. The City has breached the Settlement Agreement, including its obligation to “defend the approval, validity, constitutionality, and enforceability of th[e] Agreement.” Compl., Ex. A ¶ 10.

32. The City’s breach has caused Clear Channel injury, and Clear Channel is entitled to performance or, in the alternative, damages, costs, attorneys’ fees, and such other relief as the Court deems appropriate.

SECOND COUNTERCLAIM

Breach of Implied Covenant of Good Faith and Fair Dealing

33. Clear Channel realleges each preceding paragraph as if fully set forth herein.

34. By filing the Complaint in this action, and by arguing that the Settlement Agreement is unenforceable, the City has breached its duty of good faith and fair dealing. In particular, the City has breached this duty with respect to Paragraph 4 of the Settlement Agreement, under which the City agreed to “compensate Clear Channel for the fair market value” of any billboards the City may purport to require Clear Channel to remove, “other than in connection with the construction of digital billboards” as provided by the Agreement. Compl., Ex. A ¶ 4. Rather than perform this obligation in good faith, the City has preemptively attempted to assert that its contractual obligation is unenforceable.

35. The City’s conduct has caused Clear Channel injury, and Clear Channel is entitled to performance or, in the alternative, damages, costs, attorneys’ fees, and such other relief as the Court deems appropriate.

THIRD COUNTERCLAIM

Promissory Estoppel

36. Clear Channel realleges each preceding paragraph as if fully set forth herein.

37. The City made promises to Clear Channel that the City would comply with and defend the terms of the Settlement Agreement, including the provision stating that the City would compensate Clear Channel for the fair market value of any billboards the City required Clear Channel to remove. The City expressly made such promises in the Settlement Agreement,

1 Compl., Ex. A ¶¶ 4, 10, and by its words and conduct encouraged Clear Channel to believe it
2 would perform on those promises in good faith.

3 38. Clear Channel reasonably relied on the City's promises. For example, Clear
4 Channel agreed to dismiss its meritorious claims in the Clear Channel Action because of the
5 City's promise to compensate Clear Channel for billboards the City required Clear Channel to
6 remove other than as prescribed in the Settlement Agreement.

7 39. The City's conduct has caused Clear Channel injury, and the City is entitled to
8 equitable relief and such other relief as the Court deems appropriate.

9 **FOURTH COUNTERCLAIM**

10 **Unconstitutional Taking of Property, U.S. Const., Amend. V**

11 40. Clear Channel realleges each preceding paragraph as if fully set forth herein.

12 41. The Fifth and Fourteenth Amendments of the United States Constitution prohibit
13 the City from taking private property without providing just compensation.

14 42. S.O. 28009 empowers the City to take private property because it (1) purports to
15 require removal of certain billboards by March 2012, and (2) purports to invalidate lawfully-
16 obtained permits to relocate billboards. The Ordinance does not, however, make any provision
17 for compensation for the property taken.

18 43. The Settlement Agreement obliges the City to pay Clear Channel fair market
19 value for any billboard the City forces Clear Channel to remove. S.O. 28009 on its face does
20 nothing to impair this obligation.

21 44. In the event the Settlement Agreement is not enforceable, however, S.O. 28009
22 standing by itself authorizes takings without making the prior appropriation of funds to
23 compensate the owner of the property to be taken.

24 45. Clear Channel is entitled to a declaratory judgment that the Ordinance violates the
25 United States Constitution, to an injunction enjoining its enforcement, and to such other relief as
26 the Court deems appropriate.

FIFTH COUNTERCLAIM

Unconstitutional Regulation of Speech, U.S. Const., Amends. I & XIV

46. Clear Channel realleges each preceding paragraph as if fully set forth herein.

47. The First and Fourteenth Amendments of the United States Constitution prohibit the City from making any law “abridging the freedom of speech.”

48. S.O. 28009 violates this command in numerous ways. For example, S.O. 28009 impermissibly favors some forms of non-commercial speech over other non-commercial speech. S.O. 28009 also favors commercial over non-commercial speech. S.O. 28009 regulates non-commercial speech according to its content, is presumptively unconstitutional, and is subject to a strict scrutiny analysis. To withstand such scrutiny, S.O. 28009 must be narrowly tailored to reach a compelling state interest and use the least restrictive means available to meet its objectives. S. O. 28009 cannot satisfy this test.

49. Thus, because S.O. 28009 abridges the freedom of speech, Clear Channel is entitled (1) to a declaratory judgment that, as amended by S.O. 28009, the Tacoma Sign Code violates the First and Fourteenth Amendments of the United States Constitution, (2) to an injunction enjoining enforcement of the Code as applied to billboards, and (3) to such other relief as the Court deems appropriate.

SIXTH COUNTERCLAIM

Unconstitutional Vagueness

U.S. Const., Amends. I, V, & XIV

50. Clear Channel realleges each preceding paragraph as if fully set forth herein.

51. The Fifth and Fourteenth Amendments of the United States Constitution require that a law must give people of ordinary intelligence fair notice of what it prohibits, and must not be so standardless that it authorizes or encourages discriminatory enforcement. In particular, laws implicating First Amendment interests must identify the expressive activity they prohibit with narrow specificity.

52. S.O. 28009 purports to cap the allowable square footage of “billboard faces” and “associated structures” within the City at the amount of the “total square footage of billboards”

1 that was present in the City on August 1, 2011. T.M.C. 13.06.521.M.1.a. Starting on March 12,
 2 2012, the Ordinance purports to reduce the cap “by the number and square footage of
 3 nonconforming billboard faces in existence” on August 9, 2011. *Id.*

4 53. S.O. 28009 does not provide a person of ordinary intelligence fair notice of what
 5 the Ordinance prohibits because it does not identify the relevant square footage of billboard
 6 space present in the City on these two dates, nor does it prescribe a method for making such a
 7 calculation.

8 54. Thus, Clear Channel is entitled to a declaratory judgment that S.O. 28009 is
 9 unconstitutionally vague, to an injunction enjoining its enforcement, and to such other relief as
 10 the Court deems appropriate.

11 **SEVENTH COUNTERCLAIM**
 12 **Unconstitutional Impairment of Contractual Obligations,**
 13 **U.S. Const., Art. I, § 10**

14 55. Clear Channel realleges each preceding paragraph as if fully set forth herein.

15 56. Article I, Section 10 of the United States Constitution prohibits the City from
 16 enacting any law “impairing the Obligation of Contracts.” S.O. 28009 mandates the removal of
 17 existing nonconforming billboard signs and phases out existing billboard permits without the
 18 compensation the City is obligated to pay under the Settlement Agreement. Accordingly, it
 19 improperly impairs the parties’ obligations under that Agreement.

20 57. Thus, because S.O. 28009 improperly impairs the parties’ Settlement Agreement,
 21 Clear Channel is entitled to a declaratory judgment that the Ordinance violates Article I, Section
 22 10 of the United States Constitution, to an injunction enjoining its enforcement, and to such other
 23 relief as the Court deems appropriate.

24 **EIGHTH COUNTERCLAIM**
 25 **42 U.S.C. § 1983, *et seq.***

26 58. Clear Channel realleges each preceding paragraph as if fully set forth herein.

59. The City has enacted, implemented, permitted and condoned, and continues to
 permit and condone, the acts, practices, and failures to act, and violations complained in herein

1 to become, and continue to be, the official policy and custom of the City of Tacoma. These acts,
 2 practices, and failures to act, violate Clear Channel's rights under the First, Fifth, and Fourteenth
 3 Amendments of the United States Constitution. The City's acts, practices, and failures to act,
 4 threaten irreparable injury to Clear Channel's important constitutional rights, and Clear Channel
 5 has no adequate remedy at law.

6 60. Accordingly, Clear Channel is entitled to injunctive relief barring continued
 7 violations of its constitutional rights through enforcement of S.O. 28009 and to such other relief
 8 as the Court deems appropriate.

9 **NINTH COUNTERCLAIM**

10 **Unconstitutional Taking of Property, Wash. Const., Art. I, § 16**

11 61. Clear Channel realleges each preceding paragraph as if fully set forth herein.

12 62. Article I, Section 16 of the Washington Constitution prohibits the City from
 13 taking private property without providing just compensation. The Washington Constitution
 14 specifically requires the City to pay such just compensation prior to taking any private property.

15 63. S.O. 28009 empowers the City to take private property because it (1) purports to
 16 require removal of certain billboards by March 2012, and (2) purports to invalidate lawfully
 17 obtained permits to relocate billboards. The Ordinance does not, however, make any provision
 18 for compensation for the property taken.

19 64. The Settlement Agreement obliges the City to pay Clear Channel fair market
 20 value for any billboard the City forces Clear Channel to remove. S.O. 28009 on its face does
 21 nothing to impair this obligation.

22 65. In the event the Settlement Agreement is not enforceable, however, S.O. 28009
 23 standing by itself authorizes takings without making the prior appropriation of funds to
 24 compensate the owner of the property to be taken.

25 66. Clear Channel is entitled to a declaratory judgment that the Ordinance violates the
 26 Washington Constitution, to an injunction enjoining its enforcement, and to such other relief as
 the Court deems appropriate.

TENTH COUNTERCLAIM

Unconstitutional Regulation of Speech, Wash. Const., Art. I, § 5

67. Clear Channel realleges each preceding paragraph as if fully set forth herein.

68. Article I, Section 5 of the Washington Constitution grants all persons the right to “freely speak.”

69. S.O. 28009 violates this command in numerous ways. For example, S.O. 28009 impermissibly favors some forms of non-commercial speech over other non-commercial speech. S.O. 28009 also favors commercial over non-commercial speech.

70. S.O. 28009 regulates non-commercial speech according to its content, is presumptively unconstitutional, and is subject to a strict scrutiny analysis. To withstand such scrutiny, S.O. 28009 must be narrowly tailored to reach a compelling state interest and use the least restrictive means available to meet its objectives. S. O. 28009 cannot satisfy this test.

71. Thus, because S.O. 28009 abridges the freedom of speech, Clear Channel is entitled (1) to a declaratory judgment that, as amended by S.O. 28009, the Tacoma Sign Code violates Article I, Section 5 of the Washington Constitution, (2) to an injunction enjoining enforcement of the Code as applied to billboards, and (3) to such other relief as the Court deems appropriate.

ELEVENTH COUNTERCLAIM

Unconstitutional Vagueness

Wash. Const., Art. I, §§ 3, 5

72. Clear Channel realleges each preceding paragraph as if fully set forth herein.

73. Article I, Sections 3 and 5 of the Washington Constitution prohibit the enforcement of vague statutes to the same extent as the United States Constitution. A law is unconstitutionally vague if it fails to give people of ordinary intelligence fair notice of what it prohibits or is so standardless that it authorizes or encourages discriminatory enforcement. In particular, laws implicating free speech rights must identify the expressive activity that they prohibit with narrow specificity.

74. S.O. 28009 purports to cap the allowable square footage of “billboard faces” and “associated structures” within the City at the amount of the “total square footage of billboards” that was present in the City on August 1, 2011. T.M.C. 13.06.521.M.1.a.

75. S.O. 28009 does not provide a person of ordinary intelligence fair notice of what the Ordinance prohibits because it does not identify the relevant square footage of billboard space present in the City on these two dates, nor does it prescribe a method for making such calculation.

76. Thus, Clear Channel is entitled to a declaratory judgment that S.O. 28009 is unconstitutionally vague, to an injunction enjoining its enforcement, and to such other relief as the Court deems appropriate.

TWELFTH COUNTERCLAIM
Unconstitutional Impairment of Contractual Obligations,
Wash. Const., Art. I, § 23

77. Clear Channel realleges each preceding paragraph as if fully set forth herein.

78. Article I, § 23 of the Washington Constitution prohibits the City from enacting any law “impairing the Obligation of Contracts.” S.O. 28009 mandates the removal of existing nonconforming billboard signs and phases out existing billboard permits without the compensation the City is obligated to pay under the Settlement Agreement. Accordingly, it improperly impairs the City’s obligations under that Agreement.

79. Thus, because S.O. 28009 improperly impairs the City’s obligations under the Settlement Agreement, Clear Channel is entitled to a declaratory judgment that the Ordinance violates Article I, § 23 of the Washington Constitution, to an injunction enjoining its enforcement, and to such other relief as the Court deems appropriate.

THIRTEENTH COUNTERCLAIM
Failure to Tender Just Compensation, RCW 47.42

80. Clear Channel realleges each preceding paragraph as if fully set forth herein.

1 81. Under RCW 47.42, a municipality cannot require removal of signs “visible” from
2 a state route without first tendering just compensation into the registry of the Court. RCW
3 47.42.107 provides that:

4 (1) Just compensation shall be paid upon the removal of any existing sign
5 pursuant to the provisions of any resolution or ordinance of any county,
6 city, or town of the state of Washington. . . .

7 82. There are the following state routes in Tacoma: S.R. 163, S.R. 7, S.R. 705, S.R.
8 16, S.R. 509, and Interstate 5. Clear Channel maintains numerous structures, containing
9 numerous sign faces, which are visible from these routes and subject to forced removal.
10 Pursuant to RCW 47.42.103(2), just compensation must be made into the registry of the Court
11 before the City can require removal of these signs.

12 83. Clear Channel is entitled to a declaratory judgment that, to the extent S.O. 28009
13 is lawful at all, Clear Channel cannot be required to remove any signs covered by RCW 47.42
14 unless and until the City first tenders just compensation for those signs into the Registry of the
15 Court. Clear Channel is further entitled to such other relief as the Court deems appropriate.

16 **FOURTEENTH COUNTERCLAIM**
17 **Invalid Manner of Enactment,**
18 **U.S. Const., Amend. XIV,**
19 **Wash. Const. Art. I, § 3 Tacoma Charter**

20 84. Clear Channel realleges each preceding paragraph as if fully set forth herein.

21 85. The Fourteenth Amendment of the United States Constitution and Article I,
22 Section 3 of the Washington Constitution prevent the City from taking property without “due
23 process of law.”

24 86. Under the Tacoma City Charter, an ordinance cannot be enacted until five days
25 after it is read. The original version of what became S.O. 28009 was distributed as a part of the
26 agenda package, and made publicly available, prior to the July 26, 2011, meeting of the Tacoma
City Council. At the meeting, that version was abandoned in favor of S.O. 28009. There was no
reading, however, of S.O. 28009.

1 DATED this 19th day of December, 2011.

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3 By /s/ Paul R. Taylor

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 19th day of December, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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